Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1997

MITZI BAKER,

*Petitioner,*

v.

MARVIN T. RUNYON,
Postmaster General of the United States,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Congress intended the United States Postal Service to be "a government, government agency or political subdivision" for purposes of Title VII liability.

2. Whether the United States Postal Service is exempt from punitive damage liability pursuant to the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1), which partially modifies Title VII to include punitive damages against any respondent other than "a government, government agency or political subdivision."

3. Whether, pursuant to Supreme Court precedent, the United States Postal Service as a sue-and-be-sued agency is liable for the normal incidents of legal suit, including punitive damages.

## LIST OF PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES TO THE PROCEEDING ..... ii

TABLE OF AUTHORITIES ..... v

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

BASIS FOR JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE WRIT ..... 8

I. THE DECISION BELOW CONFLICTS WITH EXPRESS STATUTORY INTENT REGARDING TITLE VII PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION AS PROVIDED BY THE *CIVIL RIGHTS ACT OF 1964*, AS AMENDED ..... 8

A. The Seventh Circuit's Decision Raises an Important Question About Title VII's Applicability to the Postal Service ..... 8

B. The Court of Appeals' Decision Directly Conflicts with This Court's Long Progeny of Cases Specifically Dealing with the Postal Service As a Sue-And-Be-Sued Entity ..... 11

C. The Seventh Circuit's Decision is Contrary to the Congressional Intent Regarding the Unique Nature in Which the Postal Service is to Operate ..... 14

TABLE OF CONTENTS – Continued

Page

D. The District Court Decision Granting the Postal Service Immunity from Punitive Damage Liability is Inconsistent with the Express Purpose of the Civil Rights Act ..... 16

CONCLUSION ..... 17

APPENDIX A ..... A-1

APPENDIX B ..... B-1

APPENDIX C ..... C-1

# TABLE OF AUTHORITIES

Page

CASES

*F.D.I.C. v. Meyer*, 114 S.Ct. 996 (1994) .... 11, 12, 13, 14

*F.H.A v. Burr*, 309 U.S. 242 (1940) ..... 11, 12, 13

*Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512 (1984) ..... 11, 12, 13

*International Primate Protection League v. Administrators of Tulane Ed. Fund.*, 500 U.S. 72 (1991)..... 13

*Kiefer & Kiefer v. RFC*, 306 U.S. 381 (1939)..... 11

*Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994) ..... 9

*Library of Congress v. Shaw*, 478 U.S. 310 (1989)..... 13

*Loeffler v. Frank*, 486 U.S. 549 (1988)..... 11, 12, 13

*R.F.C. v. Menihan Corp.*, 312 U.S. 81 (1941) ..... 12

STATUTES

*Civil Rights Act of 1964*, 42 U.S.C. §2000e et seq. ..... 2, 3, 4, 6, 8

*Civil Rights Act of 1991*, 42 U.S.C. §1981a, et seq. ...*passim*

*Equal Employment Opportunity Act of 1972*, P.L. 92-261, et seq..... 4, 8, 10

*Postal Reorganization Act of 1970*, 39 U.S.C. §401, et seq..... 4, 7, 9, 13, 14

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

1970 U.S. Code Cong. & Admin. News, pp. 3649, 3360 ..... 11

1970 U.S. Code Cong. & Admin. News p. 3369..... 14

1972 U.S. Code Cong. & Admin. News, p. 2152..... 8

## PETITION FOR WRIT OF CERTIORARI

Petitioner Mitzi Baker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the action on June 21, 1997, which reversed a final judgment of the United States District Court for the Northern District of Illinois.

## OPINIONS BELOW

The Administrative Judge's Findings and Recommended Decision in this case is not reported in an official or an unofficial reporter, however, it is provided in the Petitioner's Appendix (App. C-1 – C-46). The decisions of the United States District Court, Northern District of Illinois in this case (App. B-1 – B-11) are reported at 922 F.Supp. 1296 and 922 F.Supp. 1300 (N.D. Ill. 1997). The decision of the Court of Appeals for the Seventh Circuit (App. A-1 – A-8) is reported at 114 F.3d 668 (7th Cir. 1997).

## BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on June 12, 1997 (App. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title VII of the *Civil Rights Act of 1964*, as amended, are set forth below:

42 U.S.C. §2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, **governments, governmental agencies, political subdivisions**, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers. (Emphasis added.)

42 U.S.C. §2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage.

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), **in the United States Postal Service and the Postal Rate Commission**, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the

Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (Emphasis added.)

42 U.S.C. §1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights.

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e-5(g)], from the respondent.

(b) Compensatory and punitive damages

(1) Determination of punitive damages:

A complaining party may recover punitive damages under this section against a respondent (**other than a government, government agency or political subdivision**) if the complaining party demonstrates that the respondent engaged in a discriminatory

> practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. (Emphasis added.)

*The Equal Employment Opportunities Act of 1972*, P.L. 92-261, §§2(1) and 2(7) and §1981a of the *Civil Rights Act of 1991* are reproduced in full in Appendix D. Additionally, the pertinent texts of the foregoing statutory provisions and executive orders are also set forth in Appendix D: *The Postal Reorganization Act of 1970*, 39 U.S.C. §401 et seq.

## STATEMENT OF THE CASE

This is a unique case which explores the balance of important legislative objectives regarding employment discrimination under the *Civil Rights Act of 1964*, 2000e et seq., and the creation of the United States Postal Service, a quasi-governmental entity, under the *Postal Reorganization Act of 1970*, 39 U.S.C. §401 et seq. Specifically, this case presents the issue of whether the United States Postal Service can be considered a "government agency," as defined in 42 U.S.C. §1981a(b)(1), for the purposes of Title VII's punitive damage exemption. The pivotal issue in the case turns on how Congress intended the Postal Service to operate in a market economy, as well as what Congress intended with regard to the scope of employment discrimination protection under Title VII. Despite Congressional intent and this Court's precedent to the contrary, the Seventh Circuit Court of Appeals has declined to find private liability for the Postal Service in Title VII actions. That determination diminishes the

important legislative goals concerning both the remediation of employment discrimination in this Country and the operation of the Postal Service as a financially self-sustaining enterprise.

The facts giving rise to the litigation can be surmised briefly. (A more comprehensive description of the facts is provided in Administrative Law Judge Mary Pappas's Findings of Fact and Recommended Decision located in Appendix C.) Petitioner Mitzi Baker is a black female employee of the United States Postal Service.[1] In January of 1991, Ms. Baker was assigned to Graceland-Annex postal facility located in Chicago, Illinois where she worked as a letter carrier. Thereafter, until her involuntary reassignment in August of 1992, Ms. Baker was subjected to sexual harassment because of her gender in the nature of a hostile work environment, as well as unwelcome sexual advances by one of her supervisors and slanderous remarks of a sexual nature.

Ms. Baker was retaliated against by her supervisors who placed her on the heaviest mail routes, and then threatened, and ultimately suspended her for poor work performance when she was unable to deliver all her mail on these routes. After filing a formal complaint, Ms. Baker was sent on a delivery route on an extremely cold day in January in an unheated Postal Service vehicle,

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[1] Since Postal Service has never disputed the findings of the Administrative Law Judge's Finding and Recommended Decision ("RD"), we will draw our recitation of the facts of this case from that document. The RD was also relied upon by Magistrate Judge Edward A. Bobrick in his opinion. See *Baker v. Runyon*, 922 F.Supp. 1300, 1302 (N.D. Ill. 1996).

which resulted in her suffering severe frostbite that required medical attention the next day.

Subsequently, Ms. Baker was placed on limited duty with medical restrictions prohibiting long standing or walking, and prohibiting outdoor work to prevent exposure to the cold weather. However, these restrictions were deliberately ignored and she was taken off light duty by her supervisors. This action caused her condition to worsen, and as a result, she was forced to undergo surgery and was required to use a cane.

On June 14, 1994, Judge Pappas, an Administrative Law Judge for the EEOC, issued a Finding of Fact and Recommended Decision. Judge Pappas recommended that the Postal Service pay Ms. Baker compensatory damages for physical and mental harm, mental anguish and grief, as well as various medical and other monetary losses caused by the sexual discrimination, sexual harassment, and acts of reprisal.

On August 8, 1994, the Postal Service issued a Final Agency Decision accepting Judge Pappas's Findings and Recommended Decision without modification. The Postal Service's Final Agency Decision awarded Ms. Baker $50,000 in compensatory damages, as well as attorney fees. Ms. Baker subsequently rejected the Final Agency Decision and elected to file a timely appeal with the EEOC's Office of Federal Operations. She filed a judicial compliant in Federal Court on June 25, 1995 alleging sexual discrimination and retaliation against the Postal Service and sought both compensatory and punitive damages under Title VII of the *Civil Rights Act of 1964*, as amended 42 U.S.C. §2000e, et seq. and the *Civil Rights Act*

*of 1991*, 42 U.S.C. §1981a, et seq. On April 18, 1996, Magistrate Judge Bobrick granted Plaintiff's Motion for Summary Judgment, in part, and awarded Ms. Baker $75,000 in compensatory and $50,000 in punitive damages. Relying on Supreme Court precedent, the district court held that the Postal Service is not exempt from punitive damage liability as it is a *sue-and-be-sued* entity, and therefore, is subject to the normal incidents of legal suit.

The Postal Service appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. In their appeal, the Postal Service relied on the language of §1981a of the *Civil Rights Act of 1991* which exempts "government, government agencies, and political subdivisions" for punitive damage liability. They asserted that the Postal Service was a government agency and therefore could not be liable to Ms. Baker for punitive damages under Title VII. Unfortunately, without paying much attention to the legislative intent of either Title VII or the *Postal Reorganization Act of 1970*, and seemingly ignoring Supreme Court precedent regarding the unique nature of the Postal Service, the Seventh Circuit reversed the lower court, holding that the Postal Service is a "government agency." As such, the Seventh Circuit has found the Postal Service to be exempt from punitive damage liability under Title VII.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH EXPRESS STATUTORY INTENT REGARDING TITLE VII PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION PROVIDED BY THE *CIVIL RIGHTS ACT OF 1964*, AS AMENDED.

#### A. The Seventh Circuit's Decision Raises an Important Question About Title VII's Applicability to the Postal Service.

In 1964, Congress enacted Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. §2000e et seq. ("1964 Act"), creating a private cause of action for employees discriminated against in the work place. Significantly, eight years later, Congress passed the *Equal Employment Opportunity Act of 1972*, P.L. 92-261 ("1972 Act"), which expanded Title VII protection by amending the 1964 Act in two places. In subsection (a) of Pub. L. 92-261, §2(1), Congress broadened Title VII's definition of "person" under section 2000e-1 to include "government, government agencies, and political subdivisions." This provision extends Title VII protection to State and local government employees formerly not covered under the Act. Congress felt this expansion was necessary so that "[a]ll State and local government employees would . . . have access to the remedies available under the Act." 1972 U.S. Code Cong. & Admin. News, p. 2152.

In the same legislation, Congress also amended Title VII to include Postal Service employees. Pursuant to subsection (j) of Pub. L. 92-261, §2(7), Congress created §2000e-16 of the Act, which expressly makes Title VII provisions applicable to the federal government, as well

as to the United States Postal Service, as established by the *Postal Reorganization Act of 1970*, 39 U.S.C. §401, et seq.

In 1991, Congress again amended Title VII by enacting the *Civil Rights Act of 1991*, 42 U.S.C. §1981a, et seq. ("1991 Act"), in order to strengthen its existing protections and remedies by providing "more effective deterrence and adequate compensation for victims of discrimination." PL 102-166 §2(b)(2) (November 21, 1991); See *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994) (explaining how the 1991 Act represents a major expansion in the relief available to victims of employment discrimination). Effectuating this purpose, the 1991 Act grants individuals discriminated against a potential remedy of compensatory and punitive damages. See 42 U.S.C. §1981a. The 1991 Act applies to all individuals that were previously covered by Title VII, *see* §1981a(d), with the exception that punitive damages are not available against the "government, government agencies, or political subdivisions" as provided for under §1981a(b)(1). The relevant language of 1991 Act reads in pertinent part:

> A complaining party may recover punitive damages under this section against a respondent (**other than a government, government agency or political subdivision**) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. §1981a(b)(1).

The pivotal issue in this case, therefore, turns on whether Congress intended to include the Postal Service when it exempted "governmental agencies" from punitive damage liability under Section 1981(a). However, since Congress does not define the term "government, government agency or political subdivision" within the 1991 Act, the appropriate starting point in determining Congress' intent regarding the Postal Service for purposes of Title VII is the 1972 Act.

Although Congress failed to provide a definition of "government, government agency, or political subdivision" in the 1991 Act, the phrase is defined in the 1972 Act. When Congress amended Title VII in 1972 with the *Equal Employment Opportunity Act*, it used the exact phrase the 1991 Act uses: "government, government agency, or political subdivision." Significantly, Congress' use of that phrase in the 1972 Act does not include the Postal Service. Rather, the phrase only refers to State and local governments. In fact, the original House bill in 1972 did not include provisions for any government or Postal employees. It was not until the Senate amended the Bill that either group was covered. *See* U.S. Code Cong. & Admin. News, pp. 2180, 2185. The fact that Congress chose to amend the Bill in one place when it wanted to provide protections specifically for State and local government employees (2000e-1), and it chose to amend the Bill in another place when it wanted to specifically include Postal employees (2000e-16), is clear and direct evidence that Congress does not consider Postal employees to be included as employees of "government, government agencies, or political subdivisions" under Title VII.

### B. The Court of Appeals' Decision Directly Conflicts with This Court's Long Progeny of Cases Specifically Dealing with the Postal Service As a Sue-And-Be-Sued Entity.

It has long been settled that the Congressional purpose in establishing the Postal Service was to permit it to operate as a financially self-sufficient entity in a "business-like" fashion. 1970 U.S. Code Cong. & Admin. News, pp. 3649, 3360. As such, Congress intended it to be treated similarly to other self-sustaining commercial ventures. *Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512, 523 (1984). To achieve this end, Congress allows the Postal Service to compete with private mail carriers by removing it from the political sphere and authorizes it to act as an independent establishment with powers equivalent to those of a private business enterprise.

The district court correctly focused on the fact that the Postal Service is a *sue-and-be-sued* entity. (See Petitioners Appendix B). As this Court's precedent illustrates, *sue-and-be-sued* instrumentalities simply cannot be lumped together with other governmental agencies when analyzing whether Congress intended they possess governmental immunity; they are a special species. See *F.D.I.C. v. Meyer*, 114 S.Ct. 996 (1994); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Franchise Tax Bd.*, 467 U.S. 512; *R.F.C. v. Menihan Corp.*, 312 U.S. 81 (1941); *F.H.A v. Burr*, 309 U.S. 242 (1940); *Kiefer & Kiefer v. RFC*, 306 U.S. 381 (1939). This follows the well established rule that when Congress creates an entity which is subsequently launched "into the commercial world," it assumes the entity is to have

"accepted the ordinary incidents of suits in such business." *Burr*, 309 U.S. at 245. It is further presumed that the entity is no "less amenable to the judicial process than a private enterprise under like circumstances would be." *Id.*

Consequently, in cases involving federal instrumentalities, this Court requires that Congressional waivers of governmental immunities from suit be liberally construed. *Franchise Tax*, 467 U.S. at 515. "Encompassed within this liberal-construction rule is the principle 'that the words sue and be sued normally include the *natural and appropriate incidents of legal proceedings.*' " *Loeffler*, 486 U.S. at 555 (quoting *Menihan*, 312 U.S. at 85) (emphasis added).

Under the liberal-construction rule established in *Burr*, the scope of *sue-and-be-sued* clauses cannot be limited unless there has been:

> a clea[r] showing that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.

*Burr*, 309 U.S. at 245; see also *Loeffler*, 486 U.S. at 561; *Franchise Tax*, 467 U.S. at 517-518; *F.D.I.C v. Meyer*, 114 S.Ct. at 1003.

None of the exceptions to the liberal-construction rule set forth in *Burr* operate to overcome the presumption that Congress intended the Postal Service to be subject to the normal incidents of legal suit. Subjecting the Postal Service to punitive damage awards is not inconsistent with the *Postal Reorganization Act*'s statutory scheme, nor does it impose a threat of "grave interference" with the Postal Service's operation, nor has Congress expressed any desire for the *sue-and-be-sued* clause to be narrowly construed. See *International Primate Protection League v. Administrators of Tulane Ed. Fund.*, 500 U.S. 72, 86 (1991) (describing the holding in *Burr*).

Therefore, when Congress launched the "Postal Service into the commercial world," and when Congress included the *sue-and-be-sued* clause in its charter, "Congress . . . cast off the Service's 'cloak of sovereignty' and [gave] it the *'status of a private commercial enterprise.'* " *Loeffler*, 486 at 556 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1989)). By doing so, Congress is "presumed to have waived *any otherwise existing immunity* of the Postal Service . . . " *Id.* (emphasis added).

Moreover, in *Franchise Tax*, this Court unanimously held that the Postal Service's liability is identical to that of any other business. 467 U.S. at 519. Accordingly, in deciding this case, it is "only natural for [this] Court to look to the liability of private businesses for guidance." *F.D.I.C. v. Meyer*, 114 S.Ct. at 1004. It is undisputed that Title VII allows for the recovery of punitive damages against private parties in cases of intentional sexual discrimination as a normal incident to legal suit. 42 U.S.C. §1981a (b)(1). Indeed, Section 1981a is a clear manifestation of Congress's intent to deter sex discrimination in

the workplace. Therefore, to be consistent with this Court's precedent, the Seventh Circuit should have held that the Postal Service cannot "escape the liability a private enterprise would face in similar circumstances." *Id.* at 1004.

### C. The Seventh Circuit's Decision is Contrary to the Congressional Intent Regarding the Unique Nature in Which the Postal Service is to Operate.

As stated previously, the Postal Service is an atypical creation of Congress different than any governmental agency. The uniqueness is manifested within the *Postal Reorganization Act of 1970*, which unlike other enabling legislation, limits the application of other Federal laws. 39 U.S.C. 410(a). This section of the Act specifically exempts the Postal Service from all other " . . . Federal laws dealing with public or federal contracts, property, works, offices, employees, budgets, or funds . . . " unless they are listed within Section 410(a). The very fact that Congress inserted specific language in the Act which comprehensively addresses the applicability of other Federal laws is, by itself, an indication that Congress intended for the Postal Service to operate in an extremely unique manner, different from governmental agencies.

Additionally, unlike any government agency, Congress intended for the Postal Service to be subject to the discipline of the marketplace. 1970 U.S. Code Cong. & Admin. News pg. 3369. Such desires are evidenced in the House Report No. 91-912, May 19, 1970 (Post Office and Civil Service Committees), granting the Postal Service

discretionary powers to manage their finances, which states:

> the Postal Service should be given the powers needed to manage well and then should be held strictly responsible for the proper use of those powers. The best possible checks against an unwise use of the borrowing power are those of the financial market – no provision of law would be nearly as effective. If, for example, the Postal Service were to propose to raise funds for operating expenses resulting from inadequate use of mail handling machinery without taking prudent steps to remedy the inadequacy, the market would reject the offerings or place upon them an unaccessibly high rate of interest.

Similarly, Congress intended Section 1981a of the *Civil Rights Act of 1991* to utilize the market economy to deter discrimination in the workplace by providing compensatory and punitive damages available to victims. Congress noted that:

> Such relief is necessary to encourage citizens to act as private attorneys general to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens.

As such, the Seventh Circuit's decision is contrary to, and diminishes the effectiveness of, the statutory intent of both pieces of legislation.

### D. The District Court Decision Granting the Postal Service Immunity from Punitive Damage Liability is Inconsistent with the Express Purpose of the Civil Rights Act.

As previously stated, Congress enacted the 1991 Act to strengthen Title VII's existing protections and remedies by providing "more effective deterrence and adequate compensation for victims of discrimination." P.L. 102-166 §2(b)(2) (November 21, 1991). In order to ensure that the objectives of civil rights laws will be realized to the fullest extent possible, Congress codified the established canon of statutory construction requiring a liberal and broad construction of remedial legislation in the 1991 Act. *See* P.L. 102 §209(a) (Stating that "All Federal Laws protecting the civil rights of persons *shall* be interpreted consistent with the intent of such laws, and *shall* be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies") (Emphasis added). Thus, for all the reasons articulated above, under a "broad and liberal" reading of the Act consistent with the Act's purpose, the proper meaning of the phrase "government, government agency, or political subdivision" cannot include the Postal Service. As such, the Seventh Circuit's decision in this case cannot harmoniously exist with statutory schemes set out by Congress regarding employment discrimination, nor can it coincide with this Court's well established precedent pertaining to the Postal Service.

## CONCLUSION

The decision of the Court of Appeals in the instant case raises a serious question about important federal civil rights legislation and should be reviewed by this Court. The course the Seventh Circuit has taken frustrates the sound and efficient administration of justice for those discriminated against. For these reasons, as well as the reasons articulated above, the Petitioner respectfully requests that this petition for certiorari be granted.

Respectfully Submitted,

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## APPENDIX - A

*Baker v. Runyon*, Nos. 96-3307 & 96-3514, Decided by the Seventh Circuit Court of Appeals on June 12, 1997.

Reported at 114 F.3d 668 (7th Cir. 1997).

**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

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Nos. 96-3307 & 96-3514

MITZI BAKER,

*Plaintiff-Appellee/Cross-Appellant,*

*v.*

MARVIN T. RUNYON, Postmaster General
of the United States,

*Defendant-Appellant/Cross-Appellee.*

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 95 C 4257 – **Edward A. Bobrick,** *Magistrate Judge.*

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ARGUED APRIL 11, 1997 – DECIDED JUNE 12, 1997

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Before CUDAHY, FLAUM, and ROVNER, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff-appellee Mitzi Baker brought suit under Title VII of the Civil Rights Act of 1964, as amended in 1991 ("the Act"), seeking both compensatory and punitive damages for sexual harassment she allegedly suffered while employed by the United States Postal Service. Defendant-appellant Marvin T. Runyon, the Postmaster General of the United States, moved to strike Baker's claim for punitive damages on the ground that the United States Postal Service is a

government agency and is therefore exempt from punitive damages under Title VII. As codified at 42 U.S.C. § 1981a(b)(1), Title VII provides that parties may recover punitive damages "against a respondent (*other than a government, government agency or political subdivision*). . . . " (emphasis added). The issue presented by this case, then, is whether the Postal Service is a "government agency" for purposes of section 1981a. The district court concluded that the Postal Service was not. Challenging this determination, the Postmaster General brings this appeal. Because we conclude that the Postal Service is a government agency for purposes of section 1981a, we reverse the judgment of the district court awarding Baker punitive damages.[1]

I.

Congress, in enacting section 1981a, exempted all government agencies from the Act's punitive damage provision, with no articulated exceptions. Because Baker has conceded that the Postal Service is a "government agency," there would therefore appear to be little for this court to decide. Not surprisingly, Baker does not view this case as quite that simple. It is her contention, a view shared by the district court, that it can be inferred from

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[1] In its order consolidating Baker's cross-appeal with the appeal of the Postmaster General, this court directed the parties to address whether Baker had established excusable neglect so as to permit her to bring her cross-appeal, despite its having been untimely filed. We need not consider this issue, however, because appellee has not argued the merits of her cross-appeal in her brief; these issues are deemed waived.

Congress' historical treatment of the Postal Service as a quasi-commercial entity, from Congress' waiver of the Service's sovereign immunity, and from the legislative history of the Civil Rights Act of 1991, that Congress did not intend to exempt the Postal Service from punitive damages. We cannot agree that this is an appropriate inference to draw.

Baker faces an uphill battle in arguing that Congress intended to subject the Postal Service to punitive damages. She is asking this court to read into the Act an exception to Congress' blanket exemption, despite the absence of any textual support for such an exclusion, because, according to Baker, this is what Congress intended. It is, however, axiomatic that "the plain language of a statute is the most reliable indicator of congressional intent." *Time Warner Cable v. Doyle*, 66 F.3d 867, 876 (7th Cir. 1995), *cert. denied, Doyle v. Time Warner Cable*, 116 S. Ct. 974 (1996); *see also Director, OWCP v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). We therefore presume that Congress would have said that all government agencies, except the Postal Service, are exempt from punitive damages, if this is what it intended.

This presumption that a statute means what it says is a difficult one to overcome. When the words of a statute are unambiguous, ordinarily the "judicial inquiry is complete." *Id.* at 254; *see also In the Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) (plain language of statute ordinarily conclusive). "The statutory

language should be conclusive except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . [or] lead to absurd results. . . . " *Time Warner Cable*, 66 F.3d at 876 (citation omitted); *see also Gryzan v. Charter Hosp. of Northwest Ind.*, 104 F.3d 116, 122 (7th Cir. 1997) (legislative history of statute examined "only for the limited purpose of determining whether it reflects a clearly expressed legislative intent to the contrary"). This is not such a case. In mounting her attack on the plain meaning of section 1981a, Baker has produced no evidence of a clear intent by Congress to saddle the Postal Service, despite its governmental nature, with judgments for punitive damages. Nor has she demonstrated that exempting the Service from punitive damage awards is "demonstrably at odds" with the goals of Title VII. As discussed below, the inferences Baker would draw from the various statutes and excerpts of legislative history cannot counter section 1981a's clear language.

## II.

We first address Baker's contention that Congress, because it intended the Postal Service to operate in a manner similar to a commercial entity, must have intended to subject the Service to punitive damages. We do not believe that it is possible to make the leap in logic Baker suggests. The Postal Service may be run in a manner *similar to* a private commercial entity, but it is not a private commercial entity. *See Silver v. United States Postal Service*, 951 F.2d 1033, 1035 (9th Cir. 1991) ("Congress could not have made its intention more clear that the

Postal Service was to remain a part of the U.S. Government and to perform executive branch functions within the government."); *Friedlander v. United States Postal Service*, 658 F. Supp. 95, 101 (D.D.C. 1987) ("Congress did not intend to create a private business, rather, it desired a more efficient government agency."). While this court, as well as the Supreme Court, has recognized the quasi-commercial nature of the Postal Service on several prior occasions, *see, e.g., Loeffler v. Frank*, 486 U.S. 549, 556 (1988); *Standard Oil Div., Am. Oil Co. v. Starks*, 528 F.2d 201, 203 (7th Cir. 1975), neither court has ever held that the Postal Service is anything other than a federal agency, *see, e.g., United States v. Bardsley*, 884 F.2d 1024, 1027-28 (7th Cir. 1989) (false statements made to Postal Service are false statements to government agency); *McGuinness v. United States Postal Service*, 744 F.2d 1318, 1322-23 (7th Cir. 1984) (only proper defendant in Title VII suit is head of agency). Congress may have vested the Postal Service with significant powers in order to increase its independence and autonomy, *see Standard Oil*, 528 F.2d at 202-03 (listing powers granted to Postal Service), but it also provided that the Postal Service is part of the executive branch of government, that its employees are part of the federal civil service, and that it possesses certain powers unique to governmental entities, such as the authority to exercise the power of eminent domain in the name of the United States. *See* 39 U.S.C. §§ 201, 1001(b) & 401(9).

Contrary to the suggestion of appellee, it would be illogical to assume that Congress, because it granted the Postal Service considerable autonomy, intended to grant the agency the status of a private actor. Congress knows

how to create entities and confer upon them non-governmental status when it is Congress' intention to do so. In establishing Amtrak and the Corporation for Public Broadcasting, for example, Congress explicitly provided that they were not agencies or establishments of the United States Government. *See* 47 U.S.C. § 396(b) (providing that Corporation for Public Broadcasting "will not be an agency or establishment of the United States Government"); 45 U.S.C. § 541 (providing that Amtrak "will not be an agency or establishment of the United States Government") (repealed). Because Congress lodged the Postal Service within the federal government, the more logical inference is that it did not intend to subject the agency to punitive damages.

Baker next points to Congress' waiver of the Postal Service's sovereign immunity to support her assertion that Congress intended to subject the Postal Service to punitive damages. As is true of many other federal agencies, the Postal Service's charter contains a "sue-and-be-sued" clause that permits the Postal Service to be sued. The presence of this clause, however, does little to advance Baker's argument. If anything, it supports the position of the Postmaster General. This waiver of sovereign immunity is necessary solely because the Postal Service is a government agency. *See Western Securities Co. v. Derwinski*, 937 F.2d 1276, 1280 (7th Cir. 1991) ("The 'sue or be sued' clause . . . operates as the necessary waiver of sovereign immunity, permitting the suit to go forward *notwithstanding that it is a suit against a federal agency.*") (emphasis added).

That Congress has waived the Postal Service's sovereign immunity does not answer the question of whether

plaintiff is entitled to punitive damages under section 1981a. As the Supreme Court has explained, in determining whether an individual can recover damages against the federal government, there are "two analytically distinct inquiries." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484 (1994) (internal quotation omitted). "The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play – that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.* The magistrate judge in the instant case appears to have conflated these distinct inquiries. Although Congress has waived the Postal Service's sovereign immunity, the substantive law relied upon by appellee in the instant case, Title VII, provides that punitive damages are not available against governmental entities. Baker is therefore back where she started, arguing that the Postal Service is subject to punitive damages, despite the fact that it is a government agency.

Lastly, Baker points to nothing in Title VII itself to suggest that exempting the Postal Service from punitive damages would be "demonstrably at odds" with the purposes of that statute or "lead to absurd results." *See Time Warner Cable*, 66 F.3d at 876. While we would agree with appellee that it is clear from the legislative history of the amendments to the Civil Rights Act that Congress intended to enact stricter measures to deter discrimination, we do not agree that this necessarily leads to the conclusion that Congress intended to subject the Postal Service to punitive damage awards. If anything, the legislative history supports the opposite conclusion, that it

was Congress' intention to exempt *all* federal agencies from such awards. See 137 CONG. REC. S29023 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy) ("Clearly, it was our intent that the limitation on punitive damages would apply to Federal, State and local governments."); 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (interpretive memorandum of Rep. Edwards) (The damage provision "reinforces the clear statutory intent that compensatory damages are available against federal, state and local governmental defendants to the same extent that they are available against private sector defendants; punitive damages are not.").

As the Supreme Court has explained, punitive damages, when awarded against governmental entities, do not serve their intended deterrent purpose. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). "[A]n award of punitive damages against a [government agency] 'punishes' only the taxpayers, who took no part in the commission of the tort." *Id.* at 267. Such awards are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* This rationale applies with equal force to the Postal Service. Although the Postal Service is a "self-funding" entity, this is not to say that it is divorced from the United States Treasury. The Postal Service is self-funding only in the sense that Congress has appropriated to it all of the Postal Service's own revenues. 39 U.S.C. § 2401(a). It nevertheless is "operated as a basic and fundamental service provided to the people by the Government of the United States . . . and supported by the people." *Id.* at § 101(a). Even in areas in which post offices are not self-

sustaining, postal service is guaranteed. *Id.* at § 101(b). Any deficiency in these revenues would require either increased postal costs, a reduction in postal services, or, instead of raising the costs of stamps, additional appropriations by Congress. *See id.* at § 2401(b) (listing appropriations, in addition to Postal Service revenues, required to operate Service in various years).

For the foregoing reasons, the judgment of the district court awarding Baker punitive damages is REVERSED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX – B

*Baker v. Runyon*, No. 95 C 4257, Decided in the United States District Court, Northern District of Illinois, Eastern Division on April 18, 1996.

Reported at 922 F.Supp. 1296 (N.D. Ill. 1996); and related matters reported at 922 F.Supp. 1300 (N.D. Ill. 1996).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **MITZI BAKER,** | ) | |
| **Plaintiff,** | ) | |
| **vs.** | ) | **No. 95 C 4257** |
| **MARVIN T. RUNYON, in his official capacity as Postmaster General of the United States,** | ) | |
| **Defendant.** | ) | |

**MEMORANDUM ORDER**
**of Magistrate Judge Edward A. Bobrick**

Before the court is the motion of defendant Marvin T. Runyon to strike the claim of plaintiff Mitzi Baker for punitive damages.

## I. BACKGROUND

Plaintiff filed her complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("1964 Act"), and the Civil Rights Reform Act of 1991, 42 U.S.C. § 1981a, *et seq.* ("1991 Act"), alleging sex discrimination and retaliation. She seeks both compensatory and punitive damages against her employer, the United States Postal Service ("Postal Service"). The only issue defendant presents in his motion to strike is whether punitive damages are available against the Postal Service in this case. At the outset, we note that defendant fails to suggest under what rule he is moving. Pursuant to Fed.R.Civ.P. 12(f), a party must file its motion to strike

prior to responding to the targeted pleading or within 20 days after the service of that pleading. Here, plaintiff filed her complaint on June 25, 1995, and defendant filed his answer thereto on September 25, 1995. The instant motion, then, is untimely under Rule 12(f). Defendant's motion is silent as to why such untimeliness should be overlooked in this case. Because the question of whether the Postal Service enjoys sovereign immunity from punitive damages is jurisdictional in nature, *Edwards v. U.S. Dept. of Justice*, 43 F.3d 312, 317 (7th Cir. 1994), the court may address it any time. Fed.R.Civ.P. 12(h)(3). We choose to do so.

## II. ANALYSIS

Ordinarily, sovereign immunity protects the federal government from suit. *Loeffler v. Frank*, 486 U.S. 549, 554, 108 S.Ct. 1965, 1969 (1988). This immunity, however, may be waived. Under the Federal Tort Claims Act ("FTCA"), the government is liable for tort claims but retains its immunity from liability for interest prior to judgment or for punitive damages. 28 U.S.C. § 2674. Congress has also waived the sovereign immunity of some federal entities by providing, in their enabling legislation, that they may sue and be sued. *Loeffler*, 486 U.S. at 554, 108 S.Ct. at 1969. The Supreme Court has explained that:

> such waivers by Congress of governmental immunity . . . should be liberally construed . . . Hence, when Congress establishes an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be

> lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must clearly be shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such a showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

*F.H.A. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940), *quoted in Loeffler*, 486 U.S. at 554-55, 108 S.Ct. at 1969. The defendant herein, the Postal Service, is subject to just such a "sue-and-be-sued" clause.

When Congress created the Postal Service in 1970, it empowered it "to sue and be sued in its official name." 39 U.S.C. § 401(1). This was part of Congress' intent that the Postal Service "be run more like a business than its predecessor, the Post Office Department." *Loeffler*, 486 U.S. at 556, 108 S.Ct. at 1969. Congress saw to it that the Postal Service case off its "cloak of sovereignty and assumed the status of a commercial enterprise." *Loeffler*, 486 U.S. at 565, 108 S.Ct. at 1974. In *Loeffler*, the Court found this waiver of sovereign immunity opened up the Postal Service to interest awards. *Id.* at 557, 565, 108 S.Ct. at 1970, 1975. With respect to the Postal Service, then, there has

been a full waiver of sovereign immunity that would allow a recovery of punitive damages where they would be available from a private commercial enterprise. Defendant does not appear to argue otherwise.[1] Thus, the

---

[1] Sue-and-be-sued entities are presumed to have fully waived immunity unless there is a clear showing that the type of suit is not consistent with the statutory scheme, that a limitation is necessary to avoid grave interference with the performance of a governmental function, or that it was plainly the purpose of Congress to use the sue-and-be-sued clause in a narrow sense. F.D.I.C. v. Meyer, ___ U.S. ___, ___, 114 S.Ct. 996, 1003 (1994). The defendant herein does not make such a showing but, instead, discusses the general policy considerations that weigh against assessing punitive damages against the government. (*Def. Mem.* at 4-6). This tactic essentially ignores the sue-and-be-sued waiver and begs the question of whether the Postal Service is the same as "the government."

Ignoring those failings for the moment, the concerns regarding punitive damages defendants raise – essentially those discussed in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-270, 101 S.Ct. 2748, 2759-2761 (1981) – are not as relevant to the Postal Service as they are to the federal government itself or other governmental entities. The central concern regarding the assessment of punitive damages against a government entity is that it would punish taxpayers as opposed to the entity. *Newport*, 453 U.S. at 267-268, 101 S.Ct. at 2759-2760. In this case, however, the Postal Service is not supported by tax dollars and has not tax-levying authority. Punitive damages against the Postal Service would be more akin to a judgment against a major utility than a government entity. Such an award might filter down to citizens, but would do so through increased rates – not taxes. Another traditional concern is the prejudicial effect that a government's taxing authority would have on a jury's fixing of the amount of punitive damages. *Id.* at 270-271, 101 S.Ct. at 2761-2762. In this case, once again, the Postal Service does not have the kind of taxing authority discussed in *Newport*. Furthermore, there is a cap in the amount of damages available

inquiry becomes "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *F.D.I.C. v. Meyer*, ___ U.S. ___, ___, 114 S.Ct. 996, 1004 (1994).

The plaintiff's claim for punitive damages herein was created by the 1991 Act. Under the 1964 Act, Title VII relief was limited to "equitable" remedies – primarily backpay. 1964 Act, 42 U.S.C. § 2000e-5(g); *Landgraf v. USI Film Products*, ___ U.S. ___, ___, 114 S.Ct. 1483, 1490 (1994). The 1991 Act significantly expanded the monetary relief potentially available, to include compensatory damages for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 1991 Act, 42 U.S.C. § 1981a(b)(3); *Landgraf*, 114 S.Ct. at 1491. In addition, the 1991 Act made punitive damages available as follows:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

---

in this case. 42 U.S.C. § 1981a(b)(3). Defendant has not addressed these distinctions, choosing instead to simply equate the Postal Service with the federal government itself, essentially ignoring the sue-and-be-sued nature of the Postal Service that sets it apart from other governmental entities and the federal government itself.

42 U.S.C. 1981a(b)(1). The question here is whether the Postal Service is exempted from exposure to punitive damages as a "government, government agency or political subdivision."

To defendant, it is self-evident that the Postal Service is exempt from punitive damage liability under § 1981a(b)(1), because it is a federal entity that is part of the federal government. (*Memorandum in Support of Defendant's Motion ("Def. Mem."),* at 2). It is, in fact, "an *independent* establishment of the Executive Branch of the government of the United States . . . " 39 U.S.C. § 201. We are not as unhesitatingly convinced that an "independent establishment" is the same as a "government, government agency or political subdivision." Defendant does little to support its contention.

The cases upon which defendant relies are less than convincing. (*Def.Mem.* at 2-3). In *Montalvo v. U.S. Postal Service,* 887 F.Supp. 63 (E.D.N.Y. 1995), the question of the Postal Service's status was not litigated, but conceded by the plaintiff therein. 887 F.Supp. at 66. In *Suhr v. Runyon,* No. 95 C 50087 (N.D.Ill. Oct. 12, 1995) 1995 WL 617478, the court found that a suit against the Postal Service was "in essence a suit against a federal agency," citing *Beth v. Espy,* 854 F.Supp. 735, 737 (D.Kan. 1994). *Beth* dealt with a suit against the Department of Agriculture which, unlike the Postal Service, actually *is* a government agency and is quite unlike a "sue-and-be-sued" entity in that it had sovereign immunity from punitive damages prior to the 1991 Act. *See Doe v. American Nat. Red Cross,* 847 F.Supp. 643, 648 (W.D.Wis. 1994) (distinguishing federal instrumentalities from federal agencies); *Greenberg v. Republic Federal Savings & Loans Ass'n,* 94 C 3789 (N.D.Ill. May 1,

1995) 1995 WL 263457 (noting same distinction). As already noted, Congress relinquished the Postal Service's sovereign immunity in 1970.

Beyond these citations, and its own tautologous recitations, the defendant offers little to show that the Postal Service qualifies as "a government, government agency or political subdivision." For example, defendant notes that the legislative history of the 1991 Act shows that Congress intended that the remedies available under Title VII did not exceed those available under 42 U.S.C. § 1981. *See Johnson v. City of Fort Lauderdale, Fla.*, 903 F.Supp. 1520, 1528 (S.D.Fla. 1995). Arguing that "governmental entities" are not liable for punitive damages under § 1981, defendant suggest that the Postal Service is, therefore, not liable for punitive damages in this case. (*Def.Mem.* at 6). Once again, however, defendant fails to address the "sue-and-be-sued" commercial nature of the Postal Service. The Postal Service simply cannot be equated with the municipalities and political subdivisions dealt with in the cases upon which defendant relies. *See Poolaw v. City of Anadarko*, 738 F.2d 364 (10th Cir. 1984); *Heritage Homes, Inc. v. Seekonk Water Dist.*, 670 F.2d 1 (1st Cir. 1982).

Defendant also refers to Congress' mention of the Postal Service along with executive agencies in 42 U.S.C. § 2000e-16(a). When Congress extended Title VII's proscription against discrimination in employment to government agencies, it referred to "executive agencies" *in addition to* the Postal Service. 42 U.S.C. § 2000e-16(a). Defendant argues that this evinces Congressional intent to treat the Postal Service the same as other agencies. We can accept that premise with regard to Title VII liability,

but not with regard to the punitive damage liability Congress created in the 1991 Act. While § 2000e-16(a) treats the Postal Service the same as an executive agency, it also treats it the same as a military department and the Library of Congress. The provision does not define the Postal Service as an agency, however, anymore than it defines it as a military department or the Library of Congress. The fact that Congress felt it necessary to specifically mention the Postal Service in addition to executive agencies in § 2000e-16(a) indicates – to the contrary of defendant's position – that Congress considered the Postal Service something other than an agency. When, in the 1991 Act, Congress exempted "government, government agency, or political subdivision," it did so without mention of the Postal Service. If the Postal Service was not considered a governmental agency in the drafting of § 2000e-16(a), it does not follow that the Postal Service became an agency – thereby included in the exemption from punitive damages – sometime prior to the drafting of the 1991 Act. If Congress had wanted to exempt the Postal Service from punitive damages in the 1991 Act, it would have mentioned it *along with* governmental agencies in the same fashion it did in § 2000e-16(a). Defendant's statutory construction argument, then, is no more convincing than his other offerings.

The issue that defendant continues to leave unresolved is the effect of the Postal Service's "sue-and-be-sued" nature on defendant's assertions of general propositions against the imposition of punitive damages on the sovereign. None of these arguments do anything to convince the court that the Postal Service and the sovereign are one and the same. Indeed, outside this courtroom, the

Postal Service spends a fair amount of money in advertising, through the likes of George C. Scott, to convince us otherwise, tauting [sic] the fact that the Postal Service receives no support through tax dollars whatsoever. While admirable, this fact, like the arguments defendant advances herein, undermines rather than supports defendant's claim of immunity from punitive damages.[2]

## III. CONCLUSION

Defendant herein has moved, in what appears to be an untimely fashion, to strike plaintiff's claim for punitive damages in this case. The arguments defendant advances against Postal Service liability might support the exemption of governmental agencies in general, but fail to address the Postal Service's status as a "sue-and-be-sued" entity. We cannot accept the analogies defendant draws between the Postal Service and municipalities, water districts, or the Department of Agriculture. Congress intended the Postal Service to be a commercial enterprise wholly unlike those entities. Nor can we accept defendant's suggestion that Congress' mention of the Postal Service along with executive agencies defines the

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[2] Indeed, one test to determine the applicability of sovereign immunity – that is, whether a suit is against the sovereign – is whether a "judgment would expend itself on the public treasury." *U.S. v. Rural Elec. Convenience Co-Op. Co.*, 922 F.2d 429, 433 (7th Cir. 1991) (*quoting Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006 (1963)). Although defendant makes no mention herein of the degree to which the Postal Service is divorced from the treasury, it would appear that, to the extent it is unsupported by tax dollars, a judgment against it would not draw from the public treasury.

Postal Service as an executive agency anymore than the Postal Service's mention with military departments defines it as one of those. In the end, the defendant has failed to touch on the significance of the Postal Service as a "sue-and-be-sued" entity and, consequently, we are unconvinced that the plaintiff's claim for punitive damages should be stricken.

For the foregoing reasons, it is hereby ordered that the defendant's motion to strike the plaintiff's claim for punitive damages is DENIED.

**ENTER:** /s/ Edward A. Bobrick
**EDWARD A. BOBRICK**
**United States**
**Magistrate Judge**

**DATE:** April 18, 1996

## APPENDIX – C

Final Agency Decision Certified No. 651 605 753, entered by Murry E. Weatherall, Manager of Human Resources on August 8, 1994.

UNITED STATES POSTAL SERVICE
GREAT LAKES AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY CASE

IN THE MATTER OF:

| | |
|---|---|
| Mitzi G. Baker,<br>Complainant.<br><br>v.<br><br>Marvin T. Ruyon,<br>Postmaster General,<br>United States Postal<br>Service,<br>Respondent. | EEOC Case No.<br>210-93-4520X<br>210-93-4528X<br><br>Case No.<br>4-D-1911-92<br>4-D-1153-92<br><br>Filed on November 25, 1992<br>December 6, 1991<br><br>Certified No. 651 605 753 |

## FINAL AGENCY DECISION

This is the final agency decision of the Postal Service in the above referenced matter. The complainant alleged that she was discriminated against based on sex (female-sexual harassment/hostile working environment), slanderous remarks, undesirable work assignments, sexual advances; and retaliation (prior EEO Activity), when issued a seven (7) day suspension, when she sought corrective action through the chain of command; retaliation (prior EEO activity), when permanently reassigned to Lakeview Station after a verbal altercation. Complainant alleged that these incidents occurred on or about November 5, 1991 and August 1, 1992.

The complaint was processed in accordance with 29 CFR § 1613.216 (29 CFR § 1614.108) and § 1613.217, which provides, in part, for an investigation, adjustment of the

complaint, a proposed disposition in writing and an offer of a hearing.

Under 29 CFR § 1614.109, a hearing was held on January 20, 21, 28, 1994, before Equal Employment Opportunity Commission Administrative Judge, Mary A. Pappas. The findings, analysts, transcript and recommended decision have been provided to the complainant and attorney. The recommended decision, finding discrimination based on sex (sexual harassment) and retaliation (previous EEO activity), is accepted by the agency. The recommended corrective action is also accepted by the agency.

The complainant will be granted back pay, with interest for the suspension, issued on November 5, 1991. All evidence of any disciplinary action or any other nature of negative measures whatsoever generated concerning the complainant will be totally expunged, and certification will be issued to complainant confirming the expungement.

The complainant will be given the opportunity to be assigned to one of the facilities of her choice, which was made known to management during the relevant period of time.

Management shall take whatever actions necessary to ensure that Complainant or any other employee is not subjected to sexual harassment in the future, and no reprisal will be taken against Complainant or any other employee for participation in the EEO process or for opposition to any form of discrimination prohibited by law.

Training will be conducted for all supervisory, managerial and all other staff at the Graceland Station, addressing their responsibilities under all Equal Employment Opportunity laws, with special emphasis on prevention and elimination of sexual harassment, including the duty to immediately and fully investigate all complaints of sexual harassment to assure that no employee is subjected to it, and that perpetrators are immediately counseled and appropriate steps taken to prevent recurrences. The Postal Service will conspicuously post a notice for a period of sixty (60) days at the Graceland Station, advising all employees and applicants that the notice is posted pursuant to an EEO decision.

Complainant will be granted $50,000.00 compensatory damages, for physical and mental harm, stress, mental anguish and other grief based on consideration of the record and medical information submitted. Medical expenses based on medical information submitted, less amount paid by OWCP, will be paid. Additional medical expenses resulting from the incidents of this complaint, less amount paid by OWCP, will be paid.

Complainant will be awarded costs and reasonable attorney fees in accordance with 29 CFR § 1614.501(e). The attorney must submit a request for fees within 30 days of receipt of a copy of this decision to:

EEO Compliance/Appeals
Coordinator
Great Lakes/Midwest Area
Appeals Processing Center
U. S. Postal Service
433 W. Van Buren Street,
Room 1122
Chicago, IL 60699-0978

## RIGHT TO FILE A CIVIL ACTION

If you are dissatisfied with the Postal Service's final agency decision in this case, you may file a civil action in an appropriate U. S. District Court within 90 calendar days of your receipt of the Postal Service's final agency decision. If you choose to file a civil action, that action should be captioned *Mitzi G. Baker v. Marvin T. Runyon, Postmaster General.* You may also request the court to appont an attorney for you and to authorize the commencement of that action without the payment of fees, costs, or security in such circumstances as the courts deems just. Your application must be filed within the same 90-day time period for filing the civil action.

## APPEAL TO THE EEOC

Alternatively, you may file an appeal with the Office of Federal Operations, Equal Employment Opportunity Commission (EEOC). Post Office Box 19848, Washington, DC 20036-0848, within 30 calendar days of the date of your receipt of this decision. *Any supporting statement or brief must be submitted to the EEOC within 30 calendar days of filing the appeal.* Along with your appeal, you must submit proof to the EEOC that a copy of the appeal and any supporting documentation were also submitted to the EEO Compliance/Appeals Coordinator, Great Lakes/ Midwest Area Office, U. S. Postal Service, 433 West Van Buren Street, Room 1122, Chicago, IL 60699-0978. Failure to file within the 30-day period could result in the EEOC's dismissal of the appeal unless you explain, in writing, the extenuating circumstances which prevented you from filing within the prescribed time limit. In this

event, extension of the time limit and acceptance of the appeal will be discretionary with the EEOC.

8-8-94
Date

/s/ M. Weatherall
Murry E. Weatherall
Manager, Human
Resources

Enclosures

Supreme Court, U.S.
FILED
AUG 31 1998
OFFICE OF THE CLERK

(2)

No. 98-24

# In the Supreme Court of the United States

OCTOBER TERM, 1997

MITZI BAKER, PETITIONER

*v.*

WILLIAM J. HENDERSON,
POSTMASTER GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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21pp

## QUESTION PRESENTED

Whether the United States Postal Service is a "government agency" exempt from punitive damages under the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1).

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Ausfeldt* v. *Runyon*, 950 F. Supp. 478 (N.D.N.Y. 1997) | 14 |
| *Baker* v. *Runyon*, 922 F. Supp. 1300 (N.D. Ill. 1996), rev'd in part, 114 F.3d 668 (7th Cir. 1997) | 5 |
| *Benderson Development Co.* v. *United States Postal Service*, 998 F.2d 959 (Fed. Cir. 1993) | 15 |
| *Carlin* v. *McKean*, 823 F.2d 620 (D.C. Cir. 1987), cert. denied, 484 U.S. 1046 (1988) | 14 |
| *Cleveland* v. *Runyon*, 972 F. Supp. 1326 (D. Nev. 1997) | 14 |
| *FDIC* v. *Meyer*, 510 U.S. 471 (1994) | 12 |
| *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512 (1984) | 12 |
| *Friedlander* v. *United States Postal Service*, 658 F. Supp. 95 (D.C.C. 1987) | 13 |
| *Griffin* v. *Runyon*, 1997 WL 359972 (N.D. Ill. 1997) | 14 |
| *Jense* v. *Runyon*, 990 F. Supp. 1320 (D. Utah 1998) | 14 |
| *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994) | 4 |
| *Loeffler* v. *Frank*, 486 U.S. 549 (1988) | 12, 13 |
| *Maksymchuk* v. *Frank*, 987 F.2d 1072 (4th Cir. 1993) | 15 |

Cases—Continued: Page

*Miller* v. *Runyon*, 932 F. Supp. 276 (M.D. Ala. 1996) ..... 14
*Moore* v. *Devine*, 780 F.2d 1559 (11th Cir. 1986) ..... 5
*Prudencio* v. *Runyon*, 76 Fair. Empl. Prac. Cas. (BNA) 1541 (W.D. Va. 1998) ..... 14
*Robinson* v. *Runyon*, No. 96-1400, 1998 WL 406434 (6th Cir. July 22, 1998) ..... 13-14
*Roy* v. *Runyon*, 954 F. Supp. 368 (D. Me. 1997) ..... 14
*Silver* v. *United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991) ..... 3, 14, 15
*Suhr* v. *Runyon*, 1995 WL 617478 (N.D. Ill. 1995) ..... 14
*Tuers* v. *Runyon*, 950 F. Supp. 284 (E.D. Cal. 1996) ..... 14
*United States* v. *Mitchell*, 463 U.S. 206 (1983) ..... 12
*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) ..... 2
*Young* v. *United States Postal Service*, 869 F.2d 158 (2d Cir. 1989) ..... 15

Constitution, statutes and regulation:

U.S. Const., Art. I, § 8 ..... 2, 7
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 *et seq.*:
42 U.S.C. 2000e(a) ..... 10, 11
42 U.S.C. 2000e-16 ..... 5, 11, 12
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42 U.S.C. 1981a ..... 4, 7
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39 U.S.C. 101 ..... 8
39 U.S.C. 101(a) ..... 3
39 U.S.C. 201 ..... 2, 7
39 U.S.C. 202 ..... 3

Statutes and regulation—Continued: Page


39 U.S.C. 202(a) ..... 8
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39 U.S.C. 202(d) ..... 8
39 U.S.C. 205(d) ..... 3, 8
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39 U.S.C. 401(2) ..... 3
39 U.S.C. 401(9) ..... 3, 9
39 U.S.C. 407 ..... 3, 9
39 U.S.C. 409(a) ..... 4
39 U.S.C. 409(b) ..... 4
39 U.S.C. 409(c) ..... 3
39 U.S.C. 409(d) ..... 4, 9
39 U.S.C. 410(b) ..... 3
39 U.S.C. 410(b)(1) ..... 8
39 U.S.C. 410(b)(2) ..... 8
39 U.S.C. 1001(b) ..... 8
39 U.S.C. 1005 ..... 3, 8
39 U.S.C. 1006 ..... 3
39 U.S.C. 2003 ..... 3
39 U.S.C. 2006(c) ..... 4, 9
39 U.S.C. 2009 ..... 3, 9
39 U.S.C. 2401 ..... 4
5 U.S.C. 105 ..... 11
5 U.S.C. 2108 ..... 8
12 U.S.C. 1702 ..... 13
15 U.S.C. 78ccc(a)(1) ..... 9
15 U.S.C. 634(b)(1) ..... 13
38 U.S.C. 1820(a)(1) ..... 13
47 U.S.C. 396(b) ..... 9
47 U.S.C. 731 ..... 9
39 C.F.R. Pt. 3 ..... 3


Miscellaneous:


136 Cong. Rec. H9556 (daily ed. Oct. 12, 1990) ..... 10
137 Cong. Rec.: 10
p. S15,460 (daily ed. Oct. 30, 1991) ..... 10
pp. H9526-9527 (daily ed. Nov. 7, 1991) ..... 10
H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. (1990) ..... 10

Miscellaneous—Continued: Page

H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970) ..... 2, 9, 13
S. Doc. No. 35, 101st Cong., 2d Sess. (1990) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-24

MITZI BAKER, PETITIONER

*v.*

WILLIAM J. HENDERSON,[1]
POSTMASTER GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 114 F.3d 668. The order of the district court denying the motion to strike petitioner's claim for punitive damages (Pet. App. B1-B10) is reported at 922 F. Supp. 1296. The district court's order awarding compensatory and punitive damages to petitioner is reported at 922 F. Supp. 1300.

### JURISDICTION

The judgment of the court of appeals was entered on June 12, 1997. The petition for a writ of certiorari was

[1] William J. Henderson is substituted for Marvin T. Runyon as respondent, pursuant to this Court's Rule 35.3.

filed on September 10, 1997.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Constitution vests Congress with the power to "establish Post Offices and post Roads." U.S. Const., Art. I, § 8. Pursuant to that power, Congress has provided for the federal government's operation of a national postal system since the late 1700s. In 1829, the Post Office became a Cabinet-level executive department. See *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121-122 (1981).

In the Postal Reorganization Act of 1970 (PRA), Congress overhauled the postal system in order to improve its management and efficiency. The PRA transformed the Post Office Department into the United States Postal Service, "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. In making that change, Congress sought to create a Postal Service that would be "freed from direct political pressures and endowed with the means of building a truly superior mail service." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). The PRA was designed to "remov[e] the day-to-day management of the Postal Service from both presidential and congressional areas of concern while still leaving the Postal Service subject to broad policy guidance." *Id.* at 13.

The PRA provides that the Postal Service "shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of

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[2] Because the petition was initially filed in the incorrect format, it was not placed on the Court's docket until June 30, 1998.

Congress, and supported by the people." 39 U.S.C. 101(a). The Postal Service has "as its basic function the obligation to provide postal services to bind the Nation together." *Ibid.* An eleven-member Board of Governors directs the Postal Service's operations. Nine Governors are appointed by the President, with the advice and consent of the Senate. The Governors then select a Postmaster General and Deputy Postmaster General, who occupy the remaining two seats on the Board. § 202; see *Silver* v. *United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991). The Governors are "officer[s] of the Government of the United States." 39 U.S.C. 205(d). Postal employees generally are subject to the same codes of conduct, criminal prohibitions, and hiring preferences as other federal employees. §§ 410(b), 1005, 1006.

Congress empowered the Postal Service to adopt rules and regulations, which are published in the Code of Federal Regulations. 39 U.S.C. 401(2); 39 C.F.R. Pt. 3. The Postal Service is subject to the Federal Tort Claims Act and numerous other federal laws regulating the operations of federal agencies, such as the Freedom of Information Act, the Government in the Sunshine Act, the Privacy Act, and laws imposing hiring restrictions. 39 U.S.C. 409(c), 410(b). The Postal Service may exercise the power of eminent domain "in the name of the United States" and may negotiate and conclude international postal treaties and conventions with other nations. §§ 401(9), 407.

The Postal Service submits an annual budget to the Office of Management and Budget; that budget is then transmitted to Congress by the President along with his overall budget. 39 U.S.C. 2009. Funds of the Postal Service are deposited in the Postal Service Fund, which is part of the federal Treasury. § 2003. All revenues

received by the Postal Service are appropriated back to it. § 2401. The Postal Service may borrow money backed by the full faith and credit of the United States government. § 2006(c).

Congress also provided that the Postal Service may "sue and be sued in its official name." 39 U.S.C. 401(1). Federal courts have jurisdiction over suits brought by or against the Postal Service, and the Postal Service may remove suits against it to federal court. § 409(a). The same venue, service of process, time limitations, and rules of procedure that apply to litigation with the United States apply to suits involving the Postal Service. § 409(b). The Department of Justice provides legal representation to the Postal Service. § 409(d).

2. In 1991, petitioner, an employee of the Postal Service in Chicago, filed two administrative complaints alleging sexual harassment and unlawful retaliation by her co-workers and supervisors. See Pet. 5. The two complaints were heard by an Administrative Judge, who found that petitioner had been subjected to sexual harassment and retaliation. See Pet. App. C2. The Postal Service accepted the Administrative Judge's findings, and awarded petitioner injunctive relief, back pay, attorney's fees and costs, and $50,000 in compensatory damages for harm occurring on or after November 21, 1991, the effective date of the Civil Rights Act of 1991.[3] *Id.* at C2-C3.

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[3] Prior to 1991, Title VII did not provide for an award of compensatory damages for claims of sexual harassment. Congress authorized such awards in the 1991 Act. See 42 U.S.C. 1981a. In the administrative proceedings, the parties agreed that, under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the compensatory damages provision is not retroactive, and that damages would be awarded only for discriminatory acts occurring on or after the effective date of the 1991 Act.

3. Petitioner accepted the injunctive relief and the award of attorney's fees, but rejected the compensatory damages award. She then filed this action in district court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, seeking $275,000 in compensatory damages and $25,000 in punitive damages. See *Baker* v. *Runyon*, 922 F. Supp. 1300, 1301 (N.D. Ill. 1996). The parties agreed that the case would be heard and decided by a United States Magistrate Judge. Because the Postal Service had adopted the recommended decision of the Administrative Judge and had agreed to award compensatory damages, it did not contest liability. See *Moore* v. *Devine*, 780 F.2d 1559, 1562-1563 (11th Cir. 1986).

The Postal Service moved to strike petitioner's request for punitive damages on the ground that it is exempt from punitive damages under 42 U.S.C. 1981a(b)(1), which provides: "A complaining party may recover punitive damages under this section against a respondent (other than a government, *government agency* or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or * * * practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual" (emphasis added). The district court rejected the Postal Service's argument that it is a "government agency" exempt from punitive damages under Section 1981a(b)(1). Pet. App. B1-B10. The court awarded petitioner $75,000 in compensatory damages and $50,000 in punitive damages. 922 F. Supp. at 1305.

3. The court of appeals reversed the award of punitive damages. The court noted that, as petitioner conceded that the Postal Service is a "government agency," she "faces an uphill battle" in arguing that

Congress did not intend to include the Postal Service within the statute's express exemption from punitive damages for government agencies. See Pet. App. A2-A3.

The court rejected petitioner's argument that the Postal Service may be subject to punitive damages because Congress intended it to operate "in a manner similar to a commercial entity." Pet. App. A4. "The Postal Service may be run in a manner *similar* to a private commercial entity, but it is not a private commercial entity," stressed the court, and "Congress could not have made its intention more clear that the Postal Service was to remain a part of the U.S. Government and to perform executive branch functions within the government." *Id.* at A4-A5. "[I]t would be illogical to assume that Congress, because it granted the Postal Service considerable autonomy, intended to grant the agency the status of a private actor. Congress knows how to create entities and confer upon them non-governmental status when it is Congress' intention to do so." *Id.* at A5-A6.

The court also rejected petitioner's contention that the waiver of sovereign immunity contained in the PRA's "sue-and-be-sued" clause shows that it is not a government agency. "If anything, [the presence of that clause] supports the position of the Postmaster General. The waiver of sovereign immunity is necessary solely because the Postal Service is a government agency." Pet. App. A6. Moreover, the court explained, the question whether Congress has waived sovereign immunity is "analytically distinct" from the question whether the substantive law provides for relief, and "[a]lthough Congress has waived the Postal Service's sovereign immunity, the substantive law relied upon by appellee in the instant case, Title VII, provides that punitive

damages are not available against government entities." *Id.* at A6-A7.

Finally, the court rejected petitioner's argument that exempting the Postal Service from punitive damages would be at odds with the purpose of Title VII. Although the court accepted that the 1991 amendments to the Civil Rights Act were intended as stricter measures to deter discrimination, the court found a clear legislative intent to exempt all federal agencies from punitive sanctions. Pet. App. A7-A9. Moreover, the court stated, awarding punitive damages against the Postal Service would not serve their intended deterrent purpose, since the cost would ultimately fall on the taxpayers, who are responsible for appropriations for the Postal Service. *Id.* at A8-A9.

**ARGUMENT**

The decision of the court of appeals, holding that the Postal Service is a "government agency" exempt from punitive damages in Title VII actions under 42 U.S.C. 1981a(b)(1), is correct. That decision also does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The decision of the court of appeals is clearly correct. Although Congress did not define the term "government agency" in the Civil Rights Act of 1991 when it added Section 1981a, there can be little doubt that the Postal Service is a "government agency," as that term is commonly understood. The Postal Service was created to implement the power of Congress to "establish the Post Office and post Roads." U.S. Const. Art. I, § 8. The PRA provides that "[t]here is established, as an independent establishment of the executive branch *of the Government of the United States*, the United States Postal Service." 39 U.S.C. 201 (emphasis

added). It also states that the Postal Service "shall be operated as a basic and fundamental service provided to the people *by the Government of the United States*." § 101 (emphasis added).

The structure of the Postal Service also shows that it is a government agency. An 11-member Board of Governors directs "the exercise of the power of the Postal Service." 39 U.S.C. 202(a). The Board consists of nine Governors appointed by the President, with the advice and consent of the Senate; the nine Governors then appoint the Postmaster General and the Deputy Postmaster General, who make up the remaining two Board members. § 202(c)-(d). Congress expressly designated the Governors as "officer[s] of the Government of the United States in the Postal Service." § 205(d).

The status of Postal Service employees also supports the conclusion that the Postal Service is a government agency. Postal Service employees "shall be in the postal career service, which shall be part of the civil service." 39 U.S.C. 1001(b). Postal Service employees are eligible for promotion and transfer to any other position in the Executive Branch for which they are qualified. § 1006. Veterans-preference requirements that govern federal employment (see 5 U.S.C. 2108) apply to Postal Service employees. 39 U.S.C. 1005. The standards of suitability, security, and conduct that apply to all federal employees apply likewise to Postal Service employees. § 410(b)(1). Congress has also made the Postal Service subject to the Freedom of Information Act, the Government in the Sunshine Act, and the Privacy Act. *Ibid.* Federal criminal laws that pertain to federal employees also apply to Postal Service employees. § 410(b)(2).

Finally, the Postal Service exercises uniquely governmental powers in numerous respects. It has the

authority to borrow money backed by the full faith and credit of the United States government. 39 U.S.C. 2006(c). It has the power "to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes." § 401(9). And it shall "have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates." *Ibid.* With the consent of the President, the Postal Service may negotiate international postal treaties or conventions. § 407. The Postal Service must submit an annual budget to the Office of Management and Budget. § 2009. And the Postal Service is represented by the Department of Justice in litigation. § 409(d).

It is apparent from these statutory provisions that the Postal Service falls within any common understanding of the term "government agency." Thus, while Congress reorganized the Postal Service to make its operations more "businesslike," H.R. Rep. No. 1104, 91st Cong., 2d Sess. 13 (1970), it also made clear that the Postal Service remains part of the federal government. By contrast, when Congress has intended to establish an entity outside the federal government, it has expressly provided that the entity in question shall not be considered an agency of the United States Government. *E.g.*, 15 U.S.C. 78ccc(a)(1) (Securities Investor Protection Corporation); 47 U.S.C. 396(b) (Corporation for Public Broadcasting); 47 U.S.C. 731 (COMSAT).

b. Nothing in the legislative history of the Civil Rights Act of 1991 suggests that Congress intended to exclude the Postal Service from the coverage of the term "government agency" without having expressly so provided. To the contrary, the few references to the federal government in the legislative history of the 1991 Act indicate that Congress intended the term to cover

the federal government generally. See 137 Cong. Rec. S15,460 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy) ("Clearly, it was our intent that the limitation on the award of punitive damages would apply to Federal, State and Local governments."); see also *id.* at H9526-9527 (daily ed. Nov. 7, 1991) (interpretive memorandum offered by Rep. Edwards) (the damages provision "reinforces the clear statutory intent that compensatory damages are available against federal, state and local governmental defendants to the same extent that they are available against private sector defendants; punitive damages are not"). The Conference Report for the 1990 bill that preceded the 1991 Act described the punitive damages section as follows: "The Conferees note that as used in Section 8, the term 'government, government agency, or political subdivision' includes the Federal government. Thus, punitive damages are not available against the Federal government." H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 21 (1990); see 136 Cong. Rec. H9556 (daily ed. Oct. 12, 1990). Although President Bush vetoed the 1990 bill, he did not do so out of disagreement with the punitive damages provision, see S. Doc. No. 35, 101st Cong., 2d Sess. 1 (1990) (veto message), and Congress reenacted the same punitive-damages language in the 1991 Act. Thus, the legislative history supports a straightforward reading of the punitive-damages language as exempting all agencies of the federal government.

c. Petitioner also contends (Pet. 10) that the 1972 amendments to Title VII show that the Postal Service is not a government agency. Petitioner points out that Congress used the phrase "government, government agency or political subdivision" in a different section of the 1972 legislation to refer only to state and local governments. See 42 U.S.C. 2000e(a). According to peti-

tioner, the fact that Congress used that phrase to refer to state and local governments, while covering the Postal Service (along with all other federal agencies) in a separate section (42 U.S.C. 2000e-16), shows that the Postal Service is not a "government, government agency, or political subdivision" under the 1991 Act.

Petitioner's argument is without merit. The 1972 amendments to Title VII do not evince any intent by Congress to exclude the Postal Service from the definition of "government, government agency, or political subdivision." Rather, in those amendments, Congress chose to deal with the coverage of state and local governments under Title VII by amending the definition of "person" in Section 2000e(a) (which otherwise covers private employers), while addressing Title VII's application to the *entire* federal government—and not just the Postal Service—in Section 2000e-16. Petitioner's reasoning would lead to the conclusion that the entire federal government, and not just the Postal Service, was excluded from the exemption from punitive damages for any "government, government agency, or political subdivision"—a result plainly contrary to both the text of the statute and the legislative intent of Congress.[4]

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[4] In the court of appeals, petitioner argued that the Postal Service should not be considered a "government agency" because Section 2000e-16, which extends Title VII to the federal government, refers first to "executive agencies" as defined in 5 U.S.C. 105, and then expressly and separately includes the Postal Service within its coverage. Congress mentioned the Postal Service expressly in Section 2000e-16, however, because employees of the Postal Service are covered by some civil service employment rules that are different from those applicable to the federal government generally, and therefore the Postal Service is not included within the definition of "executive agency" in 5 U.S.C. 105. Indeed, if

d. Petitioner also errs in her contention (Pet. 11-14) that the court of appeals' decision conflicts with this Court's decisions interpreting the "sue and be sued" clause in the Postal Service's governing statute. A "sue and be sued" clause provides a waiver of sovereign immunity for judicial actions and "the natural and appropriate incidents of legal proceedings." *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988); *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 517-518 (1984). The existence of a waiver of sovereign immunity, however, does not resolve whether the Postal Service is to be considered a "government agency" under substantive law, *i.e.*, Section 1981's punitive damages provision. The two inquiries are "analytically distinct." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983). As this Court recently explained in the context of another "sue and be sued" clause: "The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 483-484 (1994).

The mere existence of a "sue and be sued" clause does not show that the entity in question is not a government agency. To the contrary, a "sue and be sued" clause is necessary to waive sovereign immunity precisely *because* the entity in question is a government

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Congress had intended to exclude the Postal Service from the exemption from punitive damages, it could have limited the exemption to "executive agencies," and borrowed that term from Section 2000e-16. Instead, Congress used the broader phrase "government agency," thus covering all of the governmental entities that are covered by Title VII under Section 2000e-16 (as well as state and local governments).

agency. See *Loeffler*, 486 U.S. at 553 (recognizing "sue and be sued" clause as necessary waiver of sovereign immunity). If the entity is not a government agency, then there is no sovereign immunity to waive. Indeed, the Veterans Administration, 38 U.S.C. 1820(a)(1), the Small Business Administration, 15 U.S.C. 634(b)(1), and the Department of Housing and Urban Development, 12 U.S.C. 1702, also have "sue and be sued" clauses, and yet it could hardly be disputed that those entities are government agencies.

e. Finally, petitioner errs in arguing (Pet. 14-15) that the "unique nature" of the Postal Service as a quasi-commercial entity means that it is not a government agency. Congress made clear, however, that its designation of the Postal Service as an "independent establishment" was designed not to divorce the Postal Service from the Executive Branch, but rather to provide the necessary independence from political pressures to make the Postal Service more efficient. See H.R. Rep. No. 1104, *supra*, at 13. As one court has noted, "Congress did not intend to create a private business, rather, it desired a more efficient government agency." *Friedlander* v. *United States Postal Service*, 658 F. Supp. 95, 101 (D.D.C. 1987); see *id.* at 99 (rejecting separation of powers challenge to structure of Postal Service, and holding that "the Postal Service is a governmental entity of the executive branch"). Accordingly, there is no basis for petitioner's argument that Congress intended to exclude the Postal Service, uniquely among federal agencies, from the reach of Section 1981a(b)(1).

2. The decision of the court of appeals does not conflict with the decision of any other court of appeals. The only other court of appeals that has considered the issue thus far has followed the court of appeals' decision

in this case. See *Robinson* v. *Runyon*, No. 96-1400, 1998 WL 406343 at *6-*7 (6th Cir. July 22, 1998) ("It is therefore clear that the Postal Service is a government agency for purposes of Title VII and we follow the Seventh Circuit in finding that as such the Postal Service is exempt from punitive damages."). The majority of district courts that have considered the issue have also agreed.[5]

In other contexts, there is widespread recognition among the lower courts that the Postal Service is a government agency. The courts of appeals have held that the Postal Service has the enforcement authority "of the executive branch of the United States government" and that its structure satisfies Appointments Clause requirements for Executive Branch agencies, *Silver* v. *United States Postal Service*, 951 F.2d 1033, 1035 (9th Cir. 1991); that the Governors' decisions to remove the Postmaster General are like "decisions to remove [other] government officials * * * who are not civil servants," in that they are not subject to judicial review, *Carlin* v. *McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987), cert. denied, 484 U.S. 1046 (1988); that (absent express congressional authorization) civil suits against the Postal Service may not be tried to a jury because,

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[5] See, *e.g.*, *Jense* v. *Runyon*, 990 F. Supp. 1320, 1324 (D. Utah 1998); *Prudencio* v. *Runyon*, 76 Fair. Empl. Prac. Cas. (BNA) 1541 (W.D. Va. 1998); *Cleveland* v. *Runyon*, 972 F Supp. 1326 (D. Nev. 1997); *Griffin* v. *Runyon*, 1997 WL 359972 (N.D. Ill. 1997); *Tuers* v. *Runyon*, 950 F. Supp. 284 (E.D. Cal. 1996); *Ausfeldt* v. *Runyon*, 950 F. Supp. 478, 487-88 (N.D.N.Y. 1997); *Miller* v. *Runyon*, 932 F. Supp. 276, 277 (M.D. Ala. 1996); *Suhr* v. *Runyon*, 1995 WL 617478, *3 (N.D. Ill. 1995). To our knowledge, only one district court has held that the Postal Service is not a government agency under the 1991 Civil Rights Act. See *Roy* v. *Runyon*, 954 F. Supp. 368 (D. Me. 1997).

even though the Postal Service's sovereign immunity has been waived, "the party being sued is still the federal government," *Young* v. *United States Postal Service*, 869 F.2d 158, 159 (2d Cir. 1989); that the Postal Service may exercise the federal government's power of eminent domain, see *Benderson Development Co.* v. *United States Postal Service*, 998 F.2d 959, 962 (Fed. Cir. 1993); and that the Federal Rules of Appellate Procedure's 60-day time limit for filing a notice of appeal in cases involving the federal government applies to suits against the Postal Service, see *Maksymchuk* v. *Frank*, 987 F.2d 1072, 1075 (4th Cir. 1993). In short, "[n]o court has ever held the Postal Service not to be a part of the executive branch." *Silver*, 951 F.2d at 1036.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998